*Ltd.* v. *Societe Des Ateliers Et Chantiers De France*[3] was cited.

Respondents stressed the point which found favour with the learned Judge that the agreement did not talk about the petrol station. Nothing was said at all in the agreement. It is not an implied term of the agreement. He contended that the court could not take such matter into consideration. The agreement did not say the appellants could use the land as a petrol-filling and service site. Parties merely agreed that each should have a title in continuation. If the petrol station was there when the agreement was signed then the respondents could not expect the appellants to sacrifice the use of the site for development of petrol-filling and service station by accepting a 30 year lease for a title in perpetuity.

Respondents stated in respect of a registry title the State Commissioner is the approving authority. He did not dispute that the application should initially be sent to the Pemungut Hasil Tanah. See section 135(2) of the National Land Code. None of the letters came from the State Commissioner. He submitted that no decision had actually been made on subdivision. It should be pointed out that whenever the Pemungut Hasil Tanah replied by letter a copy would go to the Mentri Besar thus keeping the State authority informed.

It the learned Judge accepted the contention of the respondents, as he seemed to have, that no decision was actually made on the subdivision then, with respect, we fail to see why the learned Judge should suggest that the appellants should pursue the matter in court by way of appeal against the approving authority on ground of non-compliance with the condition improperly imposed. This is because the respondents contended as no decision was made therefore there was no appeal to be brought against a decision. The refusal of the Pemungut Hasil Tanah in *Sri Lempah's case*[1] was not due to the application being contrary to policy of Government as the basis of the refusal of the application made by the appellants. The learned Judge had found as a fact that appellants were using their portion of land as a petrol-filling and service station site prior to the signing of the agreement. Approval was also given for development of the site as a petrol-filling and service station long before the appellants decided to sell a portion of the land to the respondents. Under such circumstances how can we honestly say that the appellants were not entitled to continue with the use of their portion as a petrol-filling and service station site and that the appellants therefore expect to obtain a title in continuation as envisaged by clause 2 of the agreement.

For reasons given we are of the view that the appellants had done all that could reasonably be expected of them in pursuing their application for subdivision. In our view the appellants had complied with clause 2 of the agreement. Hence, we allowed the appeal.

*Appeal allowed.*

Solicitors: *Shearn, Delamore & Co.; Ng Ek Teong & Co.*

---

## LOH CHEE KEONG v. SYARIKAT BEE HUAT SDN. BHD. & ANOR.

[A.C.J. (George J.) June 10, 1981]
[Kuantan – Civil Appeal No. 22 of 1980]

*Damages – Road accident – Contributory negligence – Duty of on-coming bus.*

*Torts – Motor Accident – Liability – Lower court's finding of total liability on motorcyclist – Appeal allowed – Bus-driver partly to be blamed.*

The lower court found that the plaintiff, the motorcyclist, had crossed over to his wrong side of the road and that while travelling on the grass verge he suddenly skidded and fell off his motorcycle which in turn fell into the path of the on-coming motor bus driven by the second defendant as servant of the first defendant. The bus collided into the motorcycle after it had fallen on the road, and after the plaintiff had been thrown off the machine and had landed on the road but out of the way of the bus.

The learned President held the plaintiff wholly liable and dismissed his claim. The plaintiff appealed.

Held: (1) it was not the act of a prudent driver for the bus driver not to anticipate the motorcyclist losing control of his machine. When he came round the bend and saw the motorcyclist on his wrong side of the road albeit at the edge of the road with one hand to his forehead, in heavy rain, he should have considerably slowed down the bus and should have given the widest berth possible to the motorcyclist, both of which elementary precautions he did not take until it was too late;

(2) although the plaintiff was substantially responsible for his injuries there was a measure of contribution in negligence on the part of the bus driver. The plaintiff/appellant was 80%, and the driver of the motor bus 20%, to blame for the accident.

*Cases referred to:–*

(1) *Joginder Kaur* v. *Malayan Banking Berhad & Anor.* [1971] 1 M.L.J. 98.
(2) *Coghlan* v. *Cumberland* [1898] 1 Ch. 704, 705
(3) *Stapley* v. *Gypsum Mines Ltd.* [1953] 2 All E.R. 478, 486.

CIVIL APPEAL.

*Mahinder Singh* for the appellant/plaintiff.

*M. Kandiah* for the respondent/defendant.

*Cur. Adv. Vult.*

**George J.**: This is yet another of those road accident cases involving a motor bus colliding with a motor-cycle travelling in the opposite direction to the bus.

The basic relevant finding of fact by the learned President of the Sessions Court who tried the case, was that the Plaintiff, the motorcyclist, had crossed over to his wrong side of the road and that while travelling on the grass verge he suddenly skidded and fell off his motorcycle which in turn fell into the path of the on-coming motor bus driven by the 2nd Defendant as servant or agent of the 1st Defendant. The bus collided into the motorcycle after it had fallen on the road, and after the Plaintiff had been thrown off the machine and had landed on the road but out of the way of the bus.

The learned President placed the blame for the personal injuries sustained by the Plaintiff squarely on the Plaintiff and dismissed his claim with costs.

There are a number of grounds of appeal, the first and fourth of which I could not comprehend.

As to the first, in writing his grounds of decision the learned President started off, as is frequently done, by setting down the version of each the Plaintiff and the Defendant as to what had transpired. The fact that the Defendant's version may have contradicted the contents of the sketch plan or photographs does not make it any less the Defendant's version of what had transpired and I cannot see how the President could have "erred in law and in fact" when he simply stated the Defendant's version.

The fourth ground suggests to me that the draftsman of that ground had misread that part of the grounds of decision which reads, "Further the vigorous cross-examination by learned Counsel for the Plaintiff made DW1 become unnecessarily stubborn in his answer on this issue."

I cannot see how that can be read to be a criticism of Counsel for subjecting the witness to a vigorous cross-examination. I also cannot for a moment see that that sentence in the grounds of decision amount to the learned President failing "to appreciate the purpose of cross-examination" or blocking his mind to the right to expose a witness by vigorous cross-examination. It seems to me that if what the learned President had stated amounted to a criticism it was directed against the witness DW1 becoming unnecessarily stubborn.

Before me Encik Mahindar Singh of Counsel for the Appellant/Plaintiff in effect restricted himself to arguing that the learned President should have directed his mind to the question of contributory negligence and whether he accepted the Plaintiff's version or the Defendant's version of how the accident happened, the proper order should have been to find the defendants fifty per cent to blame for the accident. His submission was that the facts of this case were on all force with the facts in the case of *Joginder Kaur* v. *Malayan Banking Berhard & Anor*[1] save that contribution in the instant case should have been on a fifty-fifty basis.

Now the learned President, faced with two versions of how the accident happened each of which could and was attacked in respect of discrepancies but only in the details, made a finding of fact as he had to, and accepted the version of the driver of the bus DW1.

In *Coghlan* v. *Cumberland*[2] Lindley M.R. made the following observation:

"Even where, the appeal turns on a question of fact, the Court of Appeal has to bear in mind that its duty is to rehear the case, and the court must reconsider the materials before the Judge with such other materials as it may have decided to admit. The court must then make up its own mind, not disregarding the judgment appealed from, but carefully weighing and considering it; and not shrinking from overruling it if on full consideration the court comes to the conclusion that the judgment is wrong. When, as often happens, much turns on the relative credibility of witnesses who have been examined and cross-examined before the Judge, the court is sensible of the great advantage he has had in seeing and hearing them. It is often very difficult to estimate correctly the relative credibility of witnesses from written depositions; and when the question arises which witness is to be believed rather than another, and that question turns on manner and demeanour the Court of Appeal always is, and must be, guided by the impression made on the Judge who saw the witnesses. But there may obviously be other circumstances, quite apart from manner and demeanour, which may shew whether a statement is credible or not; and these circumstances may warrant the court in differing from the Judge, even on a question of fact turning on the credibility of witnesses whom the court has not seen."

With that observation of Lindley M.R. in mind I have perused the evidence adduced. It seems to me that Plaintiff's purported recollection of what actually took place is suspect. He was travelling on his correct side of the road and decided to cross over to the other side. He went on to testify in examination in chief as follows, "So I lifted my hand to give a hand signal to turn right. Suddenly I saw this bus coming very fast in front. I do not know what happened next ... I gave a hand signal and I saw the bus immediately. I was probably near the centre white line when the collision occurred." In cross-examination when it was put to him that his motorcycle skidded his answer was, "I was in a shock. I do not recall. I do not know where my motorcycle was found after the collision but I was told about it. I do not know which part of the road I fell after the collision. The bus was very near when I first noticed it."

All one can reliably glean from the Plaintiff's testimony amounts to his saying that all he could remember is that he had decided to get to the other side of the road and gave a hand signal and suddenly there was the bus bearing down on him. He does not know what happened after that except that he regained consciousness at the hospital.

The bus driver DW1 was more positive as to what had happened. The net effect of his testimony was that he was travelling on his correct side of the road in the rain when he saw a motor-cycle coming round a bend towards his bus travelling at the grass verge on his left. He was only 10 feet from the motorcycle when he saw it. He did not apply his brakes as the motor cyclist was travelling along the left edge of the road. The motorcycle skidded and the rider tried to get back to his correct side of the road but the motorcycle fell in the path of the bus about 5 ft. in front of the bus. He then tried to take evasive action by braking hard and swerving but there was a collision with the fallen motorcycle. He was not certain whether the rider was on the machine when the bus collided with it.

Now, the point marked F in the sketch plan is where the broken glass of the lamp of the motorcycle was found and was 2 feet from the left grass verge as one faces the direction of Jabor towards which the bus was travelling. Whatever DW1 has said about the point of impact, that point F is clearly where the impact between the bus and the motorcycle took place. If there are any doubts as to which of the two versions is the more probable I think that the point F significantly tilts the balance in favour of the bus driver's version. And particularly as the learned President came to the same conclusion there will be no interference by me of his finding of fact as to how the accident happened.

The real question that merits some consideration is whether on those facts there was contributory negligence on the part of the bus driver as was found in *Joginder Kaur's case* referred to herein-before or at all.

In that case the motorist had seen a cyclist at or about the middle of the road at a distance of some 80 yards (240 ft.) in front. The cycle was observed to being ridden in a zig-zag manner. The cyclist turned towards the middle of the road when the motorcar was some 40 to 60 feet from it. In his judgment, Ali F.J. at page 102 of the report said,

"As regards the deceased cyclist, it is not possible to ascertain from the sketch plan the manner in which he was travelling shortly before the collison. But the driver has stated in his police report that the deceased cyclist was riding in a zig-zag manner in the middle of the road. Even if this was so, he could not have been across the centre line in the wrong half of the road for the brake marks FG would suggest that at the time of the collision the cyclist was still in his own half of the road but fairly close to the centre. From the facts thus inferred and admitted by the driver it is therefore possible to consider the question of liability. The car was travelling on a straight road with its headlights on astride the centre line of the road. There was no suggestion of any other traffic present on the road at the time. There was, therefore, nothing to prevent the driver from seeing at some considerable distance ahead of him an object such as a bicycle, with or without light, which might be on the road. As it happened here, the collison occurred because the driver was unable to take any avoiding action. The clear inference is that he did not see the cyclist until it was too late. Some explanation must be forthcoming from the driver as to why he was unable to take avoiding action. His headlights were bright, the road was about 20 feet wide, there was no other traffic and his car was being driven at about 50 miles per hour. Taking the view, as I do, of the sketch plan and of the damage to the car, it must be held that a *prima facie* case of negligence has been made out against the driver."

The crux of that case was that the motorist had ample warning to take proper precautions. As Ong C.J. put it at page 99 of the report,

"Having reached this result, I must proceed to consider the share of blame which should be attached to each party for contributing to the accident. From a distance of 80 yards the cyclist had been riding in a zig-zag manner on his wrong side of the road. The respondent driver should then have taken proper precautions against any cyclist not keeping his machine under control. Besides evasive action he should have slowed down immediately. Had his speed been reduced the deceased should have crossed over in safety. For this reason it is impossible to absolve the respondent driver from blame. In my opinion he was four-fifths responsible for the accident, while the deceased himself was only one-fifth to blame."

In the instant case what warning did the bus driver have of a motor-cyclist getting into his path? At the end of his cross-examination the Plaintiff admitted, "I saw the bus only when I was very near it because there was a corner and it was raining heavily." The bus driver in cross-examination said,

"The motor-cyclist skidded as he was coming out from the corner. He was riding the motor-cycle with one hand on his forehead and another on the handle (demonstrates). When I first saw him riding in this manner, he was only 10 feet away from me. I had not applied my brakes yet.

I did not apply my brakes because he was then on the left edge of the road. At that time the motor cycle was moving. I did not notice it wobbling. The front tyre was on the grass and the rear tyre was still on the main road. When I referred to left edge of the road, I meant my left side of the road. This is as one travels from Kuantan to Jabor. From that position the motor-cyclist turned back to his correct side of the road.

I did not apply my brakes when I first saw the motor-cyclist on the left edge of the road. I did not try to turn to my right. I carried on driving on my side of the road. When I saw the motor-cyclist attempt to return to his correct side of the road, I also attempted to turn to the left to avoid him.

The motor-cyclist fell down in front of me about 5 feet away. I first applied my brakes when the motor-cyclist fell down on the road. The motorcycle fell right in front of my bus – in the centre of my correct side of the road."

While the bus driver did not have anything like the time that the motorist in *Joginder Kaur's case* had, to avoid the accident, it was not the act of a prudent driver for the bus driver not to anticipate the motor-cyclist losing control of his machine. When he came round the bend and saw the motor-cyclist on his wrong side of the road albeit at the edge of the road riding with one hand to his forehead, in heavy rain, he should have considerably slowed down the bus and should have given the widest berth possible to the motor-cyclist both of which elementary precautions he did not take until it was too late.

If the bus driver's testimony was that he did not take those precautions because he was not given the opportunity to do so in that he was too close to the motor-cyclist when he first saw him, then he should be completely exculpated. However, as has been seen, the bus driver's testimony is that he did not take any evasive action when he first saw the motor-cyclist because "he was then on the left edge of the road."

Accordingly I am of the view that although the Plaintiff was substantially responsible for his injuries there was a measure of contribution in negligence on the part of the driver of the bus.

Lord Reid said in *Stapley* v. *Gypsum Mines Ltd.*[3]

"A court must deal broadly with the problem of apportionment, and, in considering what is just and equitable, must have regard to the blameworthiness of each party, but "the claimant's share in the responsibility for the damage" cannot, I think, be assessed without considering the relative importance of his acts in causing the damage apart from his blameworthiness."

In my judgment the Plaintiff/Appellant was 80% to blame for the accident and the driver of the motor bus 20%.

I would accordingly allow the appeal. The order of the President is set aside and substituted with an order that the Defendant/ Respondent pay to the Plaintiff/Appellant 20% of $16,045.00 being the agreed amount of damages at 100%.

The parties had not indicated what part, if any, of the agreed amount was for loss of future earnings and the solution to awarding interest on the judgment amount is to award 8% interest thereon from the May 27, day of August, 1980, being the date of the decision of the lower court and I so order. The Plaintiff/Appellant shall also be entitled to the costs in the court below and of this appeal.

*Appeal allowed.*

Solicitors: *Mahindar & Co.; Khoo & Sidhu.*

---

## SYED ABU BAKAR BIN AHMAD v. PUBLIC PROSECUTOR

[O.Cr. J. (Seah J.) September 1, 1981]
[Kuching – Criminal Application No. Kg. 2 of 1981]

*Criminal Law and Procedure – Documents – Whether defence entitled to inspect documents in custody of prosecution.*

The accused applied for an order to inspect and make copies of all documents in the possession of the prosecution in connection with the trial and account books, receipt books, vouchers, bank statements, correspondence set out in the exhibit marked "A" and for other relief as the court deemed necessary. The accused contended that without a reasonable opportunity of studying the documentary material aforesaid the accused would not be able to pre-